

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 38406/2020

DOH: 27 May 2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

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SIGNATUREDATE

In the matter of:

IRENE DALE

APPLICANT

And

RIAN DU PLESSIS ATTORNEY & CONVEYANCER

FIRST RESPONDENT

JOHANNES CHRISTIAN DU PLESSIS

SECOND RESPONDENT

P J KLEYHANS INCORPORATED ATTORNEYS

THIRD RESPONDENT

LEGAL PRACTICE COUNCIL

FOURTH RESPONDENT

JUDGEMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES.
ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 01 JULY 2022**

Bam J

A. Introduction

1. This is an opposed application for leave to appeal brought by the applicant. The application is opposed by the first and second respondents, the only participating respondents in this litigation. The first respondent is a firm of attorneys through which

the second respondent practices. For ease of reference, I use the word respondent to refer to both respondents, as I had done in the judgement.

2. This case was argued on 22 February 2022. Subsequently, on 28 February, I issued an order dismissing the application based on the applicant's failure to comply with Rule 63 of the Uniform Rules. On 7 March, the applicant requested reasons for the dismissal and simultaneously, she filed her application for leave to appeal on the same day. The reasons were ultimately delivered on 30 March 2022. Since the merits of the application were already argued, I included my conclusions on the merits in the reasons.

B. Grounds of Appeal

3. The main ground of appeal raised by the applicant is that the court misdirected itself in raising a point that was never raised by the parties and not delineated in the parties' Joint Practice Note for determination. The applicant contends that the court should have exercised judicial restraint.
4. In so far as the issue of failure to comply with Rule 63, the applicant glossed over the issue and merely referred the court to various pages of her founding and replying papers and concludes that she had in fact complied with Uniform Rule 63. She avoided the addressing the issues raised in the reasons. Rule 63 was not complied with. I need not repeat my reasons for this finding as they are adequately dealt with in my reasons, including the state of the applicant's papers. As to my findings on the merits of the application, the applicant is silent. She nonetheless concludes that another court would come to a different finding.

5. On the day of argument, counsel for the applicant made the submission that the applicant stands by the grounds set out in her application for leave to appeal as supplemented by her Heads of Argument.

C. The Law

6. The test whether leave to appeal should be granted in a given matter is well established is set out in section 17 of the Superior Court Act. It reads:

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a);
and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

7. The approach to interpreting section 17 (1) (a) (i) appears in the court's reasoning in *S v Smith*:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. See *S v Mabena & Another* 2007(1) SACR 482 (SCA) para [22]. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words,

be a sound, rational basis for the conclusion that there are prospects of success on appeal.”¹

8. In *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*, the court reasoned the test introduced by section 17 (1) (a) (i) with reference to the reasoning of Bertelsmann J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*, noting:

‘The Superior Courts Act has raised the bar for granting leave to appeal in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*, Bertelsmann J held as follow:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others 1985 (2) SA 342 (T)* at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”²

D. Analysis

9. The applicant has made much of the fact that the court mero motu raised the issue of non-compliance with Rule 63 whereas the respondents had not raised the issue. She argued that by raising the issue relating to non-compliance with Rule 63, the court failed to exercise judicial restraint and allowed itself to descend into the arena.
10. The respondents argued that the court was well within its power to raise the issue of non-compliance with Rule 63. In this regard, the respondents state that the applicant’s affidavits are demonstrative of the non-compliance and, even if the court had invited

¹ 2012 (1) SACR 567, 570 paragraph 7

² (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at paragraph 25

the applicant to address it in this regard, no amount of argument or persuasion would have altered the applicant's papers. On the question of prejudice, the respondents assert that the applicant was in no way prejudiced. Consequently, the respondents conclude that this court cannot be faulted. Both parties rely on the dictum in *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* where the court remarked:

'In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth* to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function. This in turn would infringe upon the principle of legality which was explained by Ngcobo J in *CUSA v Tao Ying Metal Industries* as follows:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.'³

11. The contention that it was not for the court to raise an issue that was not identified or delineated by the parties for adjudication is not legally sound. According to *Quartermark Investments*⁴ the court is well within its powers to raise an issue even though it had not been raised by the parties. The real issue to consider is whether by doing so, it will result in unfairness to the other party and that is the issue I turn to address now.

³ (768/2012) [2013] ZASCA 150 (01/11/2013) at paragraph 20

⁴ note 2 *supra*

12. In my reasons, I detailed the state of the applicant's papers as a whole including the issue of non-compliance with Rule 63. There is no unfairness involved in the court raising an issue which is apparent from the applicant's affidavits. Even if the court had invited the applicant to address it on the state of its papers and the non-compliance with Rule 63, it would not have made any difference.

13. I made it clear in my reasons that I still considered whether it would be proper for the court to accept the papers as set out in Rule 63 (4) and concluded that it would not be proper to do so. To conclude on this point, nothing in the reasons I provided is challenged by the applicant other than a reference to some pages in the applicant's affidavit and a bold statement that she did comply. As to how the requirements of rule 63 were met, the applicant does not say. The non-compliance is in fact not challenged in any way.

14. On the question of merits, the respondents point out that the applicant's failure to interact or challenge the merits simply means that she has no chance of meeting the threshold set out in section 17 (1) (a) (i) of the Superior Courts Act. I agree.

E. Conclusion

15. There is no prospect that another court would come to a different conclusion. Consequently, the application cannot succeed.

F. Order

16. The application for leave to appeal is dismissed with costs.

NN BAM

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING:

27 May 2022

APPEARANCES

APPLICANT'S COUNSEL:

Adv Mureriwa

Instructed by:

Makota Attorneys

Pretoria

FIRST AND SECOND RESPONDENTS' COUNSEL:

Adv Grobler SC

Instructed by:

Rian du Plessis Attorneys

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